



**THE ATTORNEY GENERAL
OF TEXAS**

**JIM MATTOX
ATTORNEY GENERAL**

June 3, 1988

Mr. Bill Wells
Director
Sunset Advisory Commission
P. O. Box 13066
Austin, Texas 78711-3066

LO-88-66

Dear Mr. Wells:

You ask whether board members of a metropolitan transit authority created pursuant to V.A.T.C. article 1118x may be appointed for four year terms pursuant to section 6B(e) of that article in light of Texas constitutional restrictions on the lengths of terms for public offices.

Texas Constitution article XVI, section 30 provides in relevant part:

(a) The duration of all offices not fixed by this Constitution shall never exceed two years

. . . .

(c) The Legislature may provide that members of the governing board of a district or authority created by authority of Article III, Section 52(b)(1) or (2) or Article XVI, Section 59, of this Constitution serve terms not to exceed four years.

Section 6B(e) of article 1118x provides in relevant part:

The terms of office of any members of the board appointed after the confirmation and tax election and after the effective date of this Act are four years

V.T.C.S. art. 1118x, § 6B(e).

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It is our opinion that the provision in section 6B(e) which allows for four year terms for rapid transit authority board members is in conflict with Texas Constitution article XVI, section 30, and thus may not be implemented.

There is no constitutional provision fixing the terms of board members of a rapid transit authority. The key issue in resolving your question is therefore whether members of the board of a rapid transit authority created pursuant to article 1118x are "officers" within the meaning of Texas Constitution article XVI, section 30.

In Dunbar v. Brazoria County, 224 S.W.2d 738 (Tex. Civ. App. - Galveston 1949, writ ref'd), the court held that a county road engineer appointed under the provisions of the Optional County Road Law of 1947 (now repealed article 6716-1, V.T.C.S) was not an officer within the meaning of article XVI, section 30:

[T]he determining factor which distinguishes a public officer from an employee is whether any sovereign function of the government is conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others.

Dunbar at 740. Dunbar was cited with approval in Aldine Independent School District v. Standley, 280 S.W.2d 578, 583 (Tex. 1955) and in Green v. Stewart, 516 S.W.2d 133, 135 (Tex. 1974). See also Attorney General Opinions C-527 (1965); O-384 (1939), and Letter Advisory No. 88 (1975).

We think it apparent that the position of board member of a rapid transit authority under article 1118x meets the "sovereign function" test laid down in the leading cases cited above. The rapid transit authority is "a public body corporate and politic, exercising public and essential governmental functions." V.T.C.S. art. 1118x § 6(a). "[T]he management, control and operation of an authority and its properties shall be vested in [the] board." Id. at 4(a). The board may levy various taxes, Id. §§ 8, 11A, B. (See Aldine at 583 (power to levy taxes held to be an aspect of the sovereign power of the state)).

We note also that the provisions in article 1118x regarding qualifications for board members, V.T.C.S. article 1118x, section 6B(e), removal of board members by the board for "inefficiency, neglect of duty or malfeasance in office," V.T.C.S. article 1118x, section 4(e)(1), or removal pursuant to a recall petition directed to the appointing

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authority, V.T.C.S. article 1118x, section 4(e)(2), are consistent with our opinion that positions on the board are "offices" within the meaning of article XVI, section 30 of the Texas Constitution. See Aldine, supra.

Moreover, article 1118x repeatedly refers to the positions of board members as "offices." See, e.g., V.T.C.S. art. 1118x § 4(b), (e)(1), and (e)(2)(i).

Though, as we here rule, the board members of the rapid transit authority are officers within the meaning of article Texas Constitution article XVI, section 30, the provision of section 6B(e) of article 1118x for four year terms for board members would be constitutional if a rapid transit authority under article 1118x is "created by authority of . . . Article XVI, Section 59" of the constitution. Tex. Const. art. XVI, § 30(c). However, we discern no legislative intent in article 1118x that authorities created under that article derive their authority from article XVI, section 59. There is no reference to article XVI, section 59 in article 1118x. As originally enacted, article 1118x provided in section 4 that transit authority board members serve two year terms. Acts 1973, 63rd Leg., ch. 141, § 4 at 302, 304. In both its original and present state, article 1118x makes no other provisions which would require article XVI, section 59 authorization in order to be valid, except for the four year term provision in section 6B(e). See, e.g., section 7(a) of the act prohibiting such authorities from levying ad valorem taxes or issuing bonds or notes secured by such taxes. Attorney General Opinion H-119 (1973) ruled that article 1118x was constitutional apart from former provisions of section 13, not relevant to the issues presented here, delegating to rapid transit authorities the power to set penalties. See also City of Humble v. Metropolitan Transit Authority, 636 S.W.2d 484 (Tex. App. - Austin 1982, writ ref'd n.r.e.), appeal dismissed, 464 U.S. 802 (1983) (indicating that the creation of 1118x rapid transit authorities is not "specifically authorized" by the constitution).

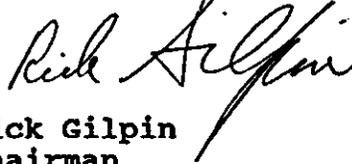
Therefore, it is our opinion that the positions of board members of a rapid transit authority created pursuant to V.A.T.S. article 1118x are "offices" within the meaning of article XVI, section 30, of the Texas Constitution, and that 1118x authorities are not created by authority of article XVI, section 59 of the constitution such that board members might be provided with four year terms, pursuant to section 30(c) of article XVI. The provision of section 6B(e) of article 1118x, that board members' terms are for four years thus may not be implemented, because it conflicts

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with the limitation in article XVI, section 30, limiting the terms of such offices to two years.

We note that your request letter indicates that the particular article 1118x authorities about which you are concerned have continued to appoint board members for two year terms out of apprehension that the four year term provision was unconstitutional. You raised no issue as to the validity of acts of board members who might have served longer than the two years to which, as we here hold, they are constitutionally restricted. Therefore, we do not address these issues. See Tex. Const. art. XVI, § 17.

Very truly yours,



Rick Gilpin
Chairman
Opinion Committee

RG/bc

Prepared by William Walker
APPROVED: OPINION COMMITTEE